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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al., Plaintiffs, v. **UNITED STATES OF AMERICA**, et al., Federal Defendants.	Case No. 6:15-cv-01517-TC **FEDERAL DEFENDANTS' MOTION TO STAY LITIGATION** **Expedited Hearing Requested**

INTRODUCTION

In a motion filed earlier today, ECF No. 120, the United States moved this Court to certify its Opinion and Order of November 10, 2016 ("November Order") to the United States Court of Appeals for the Ninth Circuit for interlocutory appeal (hereafter "Motion to Certify"), because the November Order addresses several controlling questions as to which there are substantial grounds for differences of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. The United States now respectfully moves the Court to stay this litigation pending consideration of the Motion to Certify, and until the earliest of (1) such time as the Court of Appeals declines to accept this matter for interlocutory appeal; or (2) such time as the Court of Appeals has ruled on the certified questions and issued its mandate to this Court.[1] The United States also seeks expedited consideration of this motion and specifically asks for a ruling on this motion by March 14, 2017.

As set forth below, a stay of proceedings pending resolution of the Motion to Certify and possible interlocutory appeal is appropriate because the United States is likely to prevail on appeal, will be irreparably harmed absent a stay, Plaintiffs are not likely to suffer significant injury if a stay is granted, and the public interest would be well-served by a stay. Further, expedited consideration is warranted in this given the significance of the issues raised and the burden on Federal Defendants that discovery is likely to impose.

STANDARD OF REVIEW

District courts have broad discretion to stay proceedings as an incident to its power to control its own docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (district courts possess "inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants."); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of

[1] Pursuant to Local Rule 7-1(a), the parties conferred on this motion and the request for expedition. Plaintiffs oppose this motion and the request for expedited consideration. Intervenor-Defendants do not oppose this motion or the request for expedited consideration.

independent proceedings which bear upon the case.”). Section 1292(b) specifically authorizes the district courts to exercise their discretion to stay proceedings over which they have continuing jurisdiction during the pendency of an interlocutory appeal. *See* 28 U.S.C. § 1292(b).

The Supreme Court provides four factors to be considered when exercising that discretion: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and 4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). With regard to the first of these four factors, the moving party can “show either a probability of success on the merits or that serious legal questions are raised, depending on the strength of petitioner’s showing on the other stay factors.” *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (per curiam) (internal quotation marks and citation omitted). Moreover, the “district court should consider the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *CMAX*, 300 F.2d at 268.

ARGUMENT

I. The United States is Likely to Prevail on Appeal.

As noted in the Defendants’ Motion to Certify, the Court’s rulings on the Due Process Clause and the public trust doctrine present novel issues on which reasonable jurists have a substantial basis to disagree. ECF No. 120-1 at 18-25 (“Brief”); *see Scallon v. Scott Henry's Winery Corp.*, No. 6:14-CV-1990-MC, 2015 WL 5772107, at *1 (D. Or. Sept. 30, 2015) (finding a stay pending disposition of the interlocutory appeal is appropriate “where the question for appeal is a matter of first impression" and movant "makes strong, non-frivolous, arguments"). That is, the decisions to recognize an entirely new fundamental right under the Due Process Clause of a kind never before recognized, and to expand public trust doctrine by applying it to the federal government, do not find support in existing case law. Brief at 18, 22. And the Court's rulings on standing are in tension with existing Supreme Court precedents that are intended to restrict Article III courts to actual cases and controversies, and prevent them from becoming fora for policy disagreements. *Id.* at 6-17. For these reasons, the United States is likely to succeed on the merits and it has, in all events, unquestionably raised serious legal questions. *See Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1323 (D. Or. 1997) (finding stay is appropriate given the importance of the issues raised to the entire litigation).

II. The United States Will be Irreparably Injured Absent a Stay.

The extraordinary scope of this litigation and the concomitant scope of discovery that Plaintiffs appear to be seeking set this case apart. The anticipated discovery burdens in this case are forecast by Plaintiffs' extraordinarily broad January 24, 2017 litigation hold demand letter. That letter demands preservation of, among other categories of documents over the course of nearly seven decades:

> All Documents related to climate change since the Federal Defendants or the Intervenor Defendants (and their member companies) became aware of the possible existence of climate change;
>
> All Documents related to national energy policies or systems, including fossil fuels and alternative energy sources and transportation;
>
> All Documents related to federal public lands, navigable waters, territorial waters, navigable air space or atmosphere; [and]
>
> All Documents related to greenhouse gas emissions or carbon sequestration as those terms apply to agriculture, forestry, or oceans.

Ex. A at 5-6. Prior to receipt of the January 24 letter, plaintiffs had failed to make clear the potentially enormous scope of their intended discovery.

Consistent with the January 24, 2017 letter, Plaintiffs have made clear that they intend to seek discovery relating to virtually all of the federal government's activities relating to control of CO_2 emissions, fossil fuels production and transportation, alternative energy sources, and public lands, transportation and energy policy that may relate to CO_2 emissions. Compounding the United States' burdens, Plaintiffs have indicated that their intended discovery has a temporal scope of more than sixty years, and will stretch across numerous federal agencies conducting myriad activities that involve their core functions. Absent relief, there will most certainly be depositions of federal government fact witnesses and 30(b)(6) designees that will explore the extraordinarily broad topic of climate change and the federal government's putative knowledge over the past seven decades. This endeavor is virtually limitless in its scope. Even if fact discovery were not exceptionally broad, the expert phase of discovery will most certainly be. Expert discovery will likewise be protracted, complicated and involve a large number of experts synthesizing complex data. In short, given the breadth the claims, their temporal scope, and scientific complexity, the discovery is likely to be time-consuming and resource-intensive and the litigation burdens that would occur as a result are likely to significantly impact Federal Defendants in their efforts to conduct their operations.

A stay of discovery is further appropriate because this action is unmoored to any statute that could limit its scope. Had Plaintiffs brought suit under the APA or agency-specific statutes challenging discrete agency acts or failures to act, judicial review would be on the administrative record. Here, Plaintiffs seek to circumvent that by bringing an equitable action without statutory authority. The fact that Plaintiffs have circumvented that requirement by bringing an equitable action without statutory authority makes Plaintiffs' intended discovery all the more inappropriate, and further weighs in favor of a stay pending resolution of the Motion to Certify and any related appellate proceedings. *CMAX*, 300 F.2d at 268 (where it would promote "the orderly course of justice," a stay is appropriate).

Given these substantial discovery burdens and the significance of the issues presented by the motion seeking interlocutory appeal, the "fairest course for the parties" is to stay discovery until the motion for interlocutory appeal is decided. *Mediterranean Enterprises*, 708 F.2d at 1465; *H.A.L. v. Foltz*, 2008 WL 591927, *1 (M.D. Fla. 2008) (issuing stay and concluding that "the defendants should not be subjected to the burdens of discovery" until resolution of the defendants' interlocutory appeal of court's order denying qualified immunity).

III. The Injuries to Plaintiffs Due to a Stay Should be Negligible.

A stay of these proceedings during the pendency of an appeal is not likely to appreciably harm Plaintiffs. Because Plaintiffs' claims involve complex scientific knowledge and factual allegations directed at Federal Defendants concerning conduct that took place over several decades, discovery and a trial in this case are likely to be complex and time-consuming. Indeed, Plaintiffs anticipate introducing fifteen to twenty experts in the case. Given the already complex nature of the case, and the time it would take to complete discovery and proceed to trial in this case, the additional time needed for an appeal of the legal issues is relatively modest by comparison. *Scallon*, No. 6:14-CV-1990-MC, 2015 WL 5772107, at *2 (noting that plaintiffs' claims "date back many decades" and that a "comparatively brief delay to resolve this potentially dispositive issue of law cannot be said to cause Plaintiffs substantial injury").

Insofar as Plaintiffs may argue that time is of the essence, Plaintiffs waited until 2015 to file their complaint and elected to pursue novel constitutional and public trust claims rather than challenge discrete agency actions pursuant to statutory causes of action. Thus, any delay corresponding to the need for interlocutory appellate review is eminently justified; as the party solely responsible for the timing of their civil action, Plaintiffs cannot credibly assert that a delay pending appellate review would be unjust.

IV. The Public Interest in Public Participation in the Political Process Would be Well-Served by a Stay.

The important public interest at stake raised by the Motion to Certify concerns how best to protect the atmosphere and other aspects of the environment while protecting other important values such as employment, reasonably affordable energy, balance of trade, and energy independence. Through this suit, Plaintiffs seek to remove decision-making authority on these critical issues from our publicly-elected representatives, and to have them instead decided by the Court. The proper resolution of this issue raises, among other things, core separation of powers concerns and "the public interest lies with correctly resolving the question of law at issue here. . . ." *Scallon*, No. 6:14-CV-1990-MC, 2015 WL 5772107, at *2. In addition, if a stay is not granted, the Executive Branch (including the Executive Office of the President) would be subject to continued discovery, and would be forced to divert substantial resources away from their essential functions of faithfully executing the law. The public interest accordingly will be served by staying this litigation.[2]

The provision for interlocutory appeal in 28 U. S. C. 1292(b) is intended to materially advance the litigation. Inherent in this purpose is an intention to avoid unnecessary strain on the parties and the courts. The requested stay is consistent with that goal and especially advances the public interest where agency functions and limited government resources are at stake.

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[2] Discovery served on the President is especially problematic in light of the absence of controlling statutory authority. *See* Brief at 17; *Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 501 ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.") And discovery of other components—as officials are only now coming on board—is inefficient and unnecessary at this juncture.

At a minimum, Federal Defendants are entitled to a stay in such a far-reaching case with the attendant significant discovery burdens because of the recent change in administration. Briefing incoming administration officials with decision-making responsibility concerning the extensive scope of matters involved in this litigation, including the anticipated and immediate discovery burden, will take a significant period of time. These officials will need to become familiar with the subject matter and issues presented, and seek and obtain legal counsel from both their internal agency/departmental attorneys as well as from the Department of Justice attorneys with primary responsibility for this case. The request for a stay here is therefore consistent with requests to stay proceedings to allow time for new administration officials to become familiar with litigated matters under their authority is customary and, in this case necessary, given the scope of discovery sought. *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 10 (D.D.C. 2009) (noting that an extension of a preliminary injunction briefing schedule was granted after a change in administration). Accordingly, a stay of proceedings in this case serves judicial and party economy and is well within the Court's discretion. *See Landis*, 299 U.S. at 254 (district court has broad discretion to stay proceedings as an incident to its power to control its own docket).

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court stay this litigation pending consideration of the Motion to Certify and until the earliest of (1) such time as the Court of Appeals refuses to accept an interlocutory appeal of the Court's

November 10, 2016 order; or (2) such time as the Court of Appeals has ruled on the certified questions and issued its mandate to this Court.

Dated: March 7, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 7, 2017 I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

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